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IN THE

Supreme Court of The United States

October Term 1969

No. _____

VAUGHN L. TOWNSEND, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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v.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Seventh Circuit entered in the above case on July 9, 1970 and August 19, 1970 (denying rehearing).

OPINIONS BELOW

The opinion of the District Court for the Southern District of Indiana, Indianapolis Division, is unreported

and a copy thereof is appended to this petition in the Appendix at p. A-3. The opinion of the Court of Appeals for the Seventh Circuit is not yet reported and a copy thereof, together with a copy of the companion case of *United States v. Gallagher*, are appended to this petition in the Appendix at p. A-23.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was made and entered on July 9, 1970, and a copy thereof is appended to this petition in the Appendix at p. A-1. The order of the Court of Appeals for the Seventh Circuit denying petitioner's timely-filed petition for rehearing was made and entered on August 19, 1970, and a copy thereof is appended to this petition in the Appendix at p. A-2. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

While under indictment for alleged violations of Sections 7201 and 7206(2) of the Internal Revenue Code (28 U.S.C. 7201, 7206(2)), the petitioner filed a motion to suppress certain oral statements made to and records obtained by government agents. Prior to the District Court's ruling on the motion, two cases involving the identical legal question reached the United States Court of Appeals for the Seventh Circuit. The legal question was whether *Miranda* warnings must be given a taxpayer, who is not in custody, at the inception of the first contact with the taxpayer after the case has been transferred to the Intelligence Division of the Internal Revenue Service. Because of a telephone call from the Court of Appeals to the District

Court, the latter understood and announced to counsel that these cases were about to be decided by the Court of Appeals. (R, 781). One of these pending cases, later reported as *United States v. Habig*, 413 F.2d 1108 (C.A. 7, 1969), was on appeal by the government from the same District Court, which had suppressed the evidence when the case was before it. In the case at bar, the District Court intended to await the publication of these decisions to avoid a probable useless and inconclusive ruling. (Appendix, p. A-15). The above legal question was answered in the affirmative in the decision in the other of these two cases, rendered July 28, 1969, *United States v. Dickerson*, 413 F.2d 1111. In the course of its opinion in *Dickerson*, the Court of Appeals for the Seventh Circuit said (p. 1117 of 413 F.2d):

> ". . . In conformity with the more recent practice as developed in Stovall, supra, and Desist v. United States, 394 U.S. 244, 89 S.Ct. 1048, 22 L.Ed. 2d 248, we have determined to apply our holding to interrogations taking place after the date of this decision. . . . The defendant in the companion Habig case, which was argued together with the instant case, will also be entitled to the benefit of today's holding. However, it is not our intent to disturb previously ordered suppressions of evidence anticipating our holding today . . ."

On November 7, 1969 the District Court granted the motion to suppress on authority of *Dickerson*. The Court of Appeals reversed, without according petitioner an opportunity for oral argument. No separate opinion was written but a footnote indicating the Court of Appeals' disposition was contained in the companion case of *United States v. Gallagher*, not yet reported, a copy of which is appended in the Appendix at p. A-23. The footnote

appears at p. A-27 of the Appendix.

The questions presented are:

1. Whether the Court of Appeals in a *Miranda*-type case, after ruling that evidence should be suppressed and that although its decision was "prospective" it would not disturb previously ordered suppressions anticipating its decision, can reverse a post-decisional suppression when the lower court specifically deferred its ruling on a motion to suppress on the same legal question for the sole purpose of awaiting the Court of Appeals decision on such legal question in order to avoid a probable useless and inconclusive ruling.

2. Whether it is in conflict with the decisions of this Court for a Court of Appeals in applying *Miranda* to a specific fact situation, namely the first contact by Internal Revenue Service agents with the taxpayer after his case has been referred to the Intelligence Division, to limit the application of its decision to interrogations occuring subsequent to the decision when this Court has prescribed the time of trial as the critical date in *Miranda* situations.

STATUTES, FEDERAL RULES INVOLVED

28 U.S.C. 7201 provides as follows:

> "Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution."

28 U.S.C. 7206(2) provides as follows:

"Any person who—

> . . . Willfully aids or assists in, or procures, counsels, or advises the preparation or presentation under, or in connection with any matter arising under, the internal revenue laws, of a return, affidavit, claim, or other document, which is fraudulent or is false as to any material matter, whether or not such falsity, or fraud is with the knowledge or consent of the person authorized or required to present such return, affidavit, claim, or document. . . ,

shall be guilty of a felony and, upon conviction thereof, shall be fined not more than $5,000, or imprisoned not more than 3 years, or both, together with the costs of prosecution."

The pertinent provisions of 28 U.S.C. 3731 are as follows:

. . . . .

"An appeal may be taken by and on behalf of the United States from the district courts to a court of appeals in all criminal cases in the following instances:

. . . . .

"From an order, granting a motion for return of seized property or a motion to suppress evidence, made before the trial of a person charged with a violation of any law of the United States, if the United States attorney certifies to the judge who granted such motion that the appeal is not taken for purpose of delay and that the evidence is a substantial proof of the charge pending against the defendant . . ."

Rule 2 of the Federal Rules of Appellate Procedure provides as follows:

> "In the interest of expediting decision, or for other good cause shown, a court of appeals may, except as otherwise provided in Rule 26(b), suspend the requirements or provisions of any of these rules in a particular case on application of a party or on its own

motion and may order proceedings in accordance with its direction."

STATEMENT

The petitioner was indicted in 1965 for alleged violations of Sections 7201 and 7206(1, 2) of the Internal Revenue Code, 28 U.S.C. 7201, 7206(1, 2). The original indictment was dismissed and the petitioner was reindicted in 1966 under Sections 7201 and 7206(2) of the Internal Revenue Code, 28 U.S.C. 7201, 7206(2). After the original indictment was returned, petitioner filed a motion to suppress all oral statements made by him and his partners, all partnership records of the partnership, and the transcripts of formal question-and-answer statements given by petitioner and his partners. The motion to suppress was granted in 1966 as to the question-and-answer statements but denied as to the other items. The original indictment thereafter was dismissed because it had been based in part on the suppressed question-and-answer statements. After the superseding indictment had been returned, petitioner renewed his motion to suppress, except as to the question-and-answer statements which had already been suppressed. (Appendix, p. A-4.)

Prior to the District Court's ruling on the motion to suppress, two cases involving the identical legal question reached the Court of Appeals for the Seventh Circuit for decision. One of the cases, *United States v. Habig*, 413 F. 2d 1108, (C.A. 7, 1969) was an appeal from the same District Court. In this case the District Court had suppressed the evidence (p. 1110 of 413 F.2d). The other case was *United States v. Dickerson*, 413 F.2d 1111 (C.A. 7, 1969). In this case the Court of Appeals decided as follows (at pp. 1116-1117 of 413 F.2d):

> "Our conclusion is that *Miranda* warnings must be given to the taxpayer by either the revenue agent or the special agent at the inception of the first contact with the taxpayer after the case has been transferred to the Intelligence Division . . ."

The Court of Appeals also stated (at pp. 1117-1118 of 413 F.2d 1111):

> . . . . "The defendant in the companion *Habig* case, which was argued together with the instant case, will also be entitled to the benefit of today's holding. However, it is not our intent to disturb previously ordered suppressions of evidence anticipating our holding today. . ."

On November 7, 1969 the District Court granted the motion to suppress (Appendix, pp. A-3, 19) on authority of *Dickerson*. The Court of Appeals did not write a separate opinion in the case at bar but did write an opinion in *United States v. Gallagher*, a copy of which is appended hereto in the Appendix at p. A-23. In *Gallagher* the Court held that the defendant-appellee Gallagher was not entitled to the application of the *Dickerson* holding.

The Court of Appeals in footnote 5 of *Gallagher* indicated its view of the case at bar and summarily reversed the District Court. The Court of Appeals stated (Appendix, p. A-27):

> "Since the first issue in *United States v. Gallagher* is the same as the sole issue raised on appeal in *United States v. Townsend* (No. IP 66-Cr-61C, S.D. Ind. 1969), now pending before this Court on appeal (No. 18159), we shall summarily dispose of that appeal pursuant to Rule 2 of the Federal Rules of Appellate Procedure. *National Labor Relations Board v. Playskool, Inc.*, . . . F.2d . . . (7th Cir. 1970). In *Townsend* the district court erroneously applied the standard prescribed in *United*

States v. Dickerson, 413 F.2d 1111 (7th Cir. 1969), to dispose of a motion to suppress evidence then pending before the court. The order of the district court in that case is therefore reversed."

The pertinent facts in *Gallagher* were that the interrogations of Gallagher, an attorney, took place prior to the decision of the Court of Appeals in *Dickerson* and the ruling by the District Court was delayed at the request of the Government until after the Court of Appeals announced its decisions in *Habig*, *Dickerson* and *United States v. Lackey*, 413 F.2d 655 (C.A. 7, 1969). Appendix, p. A-26. The pertinent facts in the case at bar are as follows: The oral statements and records of petitioner and his partners, none of whom were attorneys, were likewise obtained prior to the decision in *Dickerson*. (Appendix pp. A-19, 20.) The District Court, having received a telephone call from the Court of Appeals concerning its ruling on the motion to suppress in the proceedings against petitioner under the original indictment, anticipated a decision in the near future in *Habig* and *Dickerson*. (R. 201). The District Court had already suppressed the evidence in *Habig* (413 F.2d 1108) and intended to await the decisions in *Habig* and *Dickerson* to avoid a probable useless and inconclusive ruling in the case at bar. Appendix p. A-15.

REASONS FOR GRANTING WRIT

1. The Court of Appeals in *Dickerson* stated that it was not the Court's intention to disturb previously ordered suppressions of evidence anticipating its decision (p. 117 of 413 F.2d). In the case at bar, as noted above, the District Court had before it a motion to suppress involving the identical legal issue as in *Dickerson* and *Habig*. The

District Court had decided the *Habig* case in the first instance, and a telephone call was received from the Court of Appeals concerning the matter. The District Court as a resulted anticipated an imminent ruling by the Court of Appeals and intended to await the decision in *Habig* and *Dickerson*. (R. 264; Appendix p. A-15.) The District Court had already suppressed evidence in *Habig* when it was before it. Petitioner believed when in the Court of Appeals and still believes that under these circumstances the order of the District Court suppressing the evidence "anticipated" the Court of Appeals' decision. Had the District Court entered its order suppressing the evidence one day prior to the decision in *Dickerson*, then there could have been no possible question raised. It is clear from all the facts that the District Court would have suppressed the evidence had it entered its order one day before *Dickerson*. The fact that the District Court was particularly aware of the forthcoming decisions in *Habig* and *Dickerson* and elected to await their publication to avoid a useless and inconclusive ruling should not bring about the incongruous result imposed by the Court of Appeals.

The relationship of the case at bar is further strengthened by the fact that in *Dickerson* the Court of Appeals cited the proceedings in the case at bar under the original indictment as a footnote to its statement concerning pre-*Dickerson* rulings of District Courts in the Seventh Circuit (at p. 1114 of 413 F.2d):

> "In this Circuit, the district courts recently considering the question have uniformly held that some form of warnings must be given by IRS agents once an investigation has shifted to one criminal in nature, despite the absence of physical custody . . ."

The result obtained by the Court of Appeals in reversing the District Court's judgment is a denial to petitioner of his Constitutional rights which he asserted even before *Miranda* and it is respectfully submitted that no decision of this Court either requires or permits such result. If it was appropriate for the Court of Appeals to limit its decision in *Dickerson* to subsequent interrogations and to except previously ordered suppressions anticipating the decision, upon any principle the action of the District Court here was within the exception.

2. A more far reaching aspect of this case concerns the determination of the Court of Appeals in the case at bar, and more particularly expressed in the opinion in *United States v. Gallagher* (Appendix p. A-23), to which the case at bar was footnoted, that the rule announced in *Dickerson* applies only to interrogations taking place after the date of the *Dickerson* decision.

Petitioner did not argue against the stated applicability of Dickerson below, firmly believing that, under the peculiar circumstances of his case and its inextricable connection with *Dickekson*, he clearly was within the specific language of *Dickerson*.

The principle holding in *Dickerson* deals with a specific application of the requirement to give *Miranda* warnings. In *Johnson v. New Jersey*, 384 U.S. 719 (1966) this Court determined that the guidelines laid down in *Miranda v. Arizona*, 384 U.S. 436 (1966) were available in cases where the trial began after June 13, 1966, the date of the *Miranda* decision. As recently as last year, in *Jenkins v. Delaware*, 395 U.S. 213 (1969), this Court adhered to this determination, and additionally held that *Miranda* did not apply to a retrial of a defendant whose first trial commenced prior to June 13, 1966. Thus this Court has clearly stated the

applicability of *Miranda* with respect to its prospective or retroactive effect. The decision of the Court of Appeals for the Seventh Circuit has adapted and applied a different rule in conflict with these cases, namely by using the date of the interrogations instead of the trial as the critical date.

While the cases of *Stovall v. Denno*, 388 U.S. 293 (1967) and *Desist v. United States*, 394 U.S. 244 (1969) apply a different point of time than *Miranda*, they both relate to non-*Miranda* matters and both pre-date *Jenkins v. Delaware*, supra, which, like the case at bar, deals with a *Miranda* situation.

The case at bar grows out of *Dickerson* which was an application of *Miranda* to a specific type of situation. It can be expected there will be other specific applications of *Miranda*. Thus it is submitted that the question presented is one of general application and importance, and that the conflicting decision of the Court of Appeals should be reviewed by this Court.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari be granted.

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APPENDIX

United States Court Of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Thursday, July 9, 1970

Before

HON. ROGER J. KILEY, *Circuit Judge*
HON. WALTER J. CUMMINGS, *Circuit Judge*
HON. JAMES E. DOYLE, *District Judge*

No. 18159
UNITED STATES OF AMERICA,
Plaintiff-Appellant,
vs.
VAUGHN L. TOWNSEND,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

IT IS ORDERED and adjudged by this Court that the judgment of the United States District Court for the Southern District of Indiana, Indianapolis Division, in this cause appealed from be, and the same is hereby, REVERSED.

(See opinion of this Court in Appeal No. 18000—*United States of America* v. *James F. Gallagher,* filed this day.)

United States Court Of Appeals

For the Seventh Circuit
Chicago, Illinois 60604

Wednesday, August 19, 1970

Before

HON. ROGER J. KILEY, *Circuit Judge*

HON. WALTER J. CUMMINGS, *Circuit Judge*

HON. JAMES E. DOYLE, *District Judge*

No. 18159 UNITED STATES OF AMERICA, *Plaintiff-Appellant,* vs. VAUGHN L. TOWNSEND, *Defendant-Appellee.*	Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division.

IT IS ORDERED by the Court that the petition for rehearing in the above-entitled cause be, and the same is hereby denied.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
Indianapolis Division

No. IP 66-CR-61

UNITED STATES OF AMERICA

v.

VAUGHN L. TOWNSEND

ENTRY OF RULING ON DEFENDANT'S JULY 1, 1966 MOTION FOR RETURN OF PROPERTY AND TO SUPPRESS EVIDENCE

The matter of the defendant's July 1, 1966 Motion For Return Of Property And To Suppress Evidence came on for the Court's ruling.

The forerunner of the captioned case was the four count indictment filed in this Court on August 20, 1965 in the action entitled *United States of America v. Vaughn L. Townsend*, Cause Number IP 65-Cr-115. Count one charged the defendant with violating Title 26 U.S.C. Section 7206(1) pertaining to the false reporting of earnings for the year 1959 of a partnership Townsend Tree Service Company. Count two charged the defendant with violating Title 26 U.S.C. Section 7201 pertaining to the wilful evasion of his income tax for the year 1959. Counts three and four charged the defendant with violating Title 26 U.S.C. Section 7206(2) pertaining to the wilful aiding and assisting his two partners in filing false income tax returns. On November 8, 1965, the defendant filed his verified Motion

For Return of Property And To Suppress Evidence. Evidence was heard on February 18 and 25, 1966, and on March 3 and 4, 1966, when the Court orally ruled upon the motion. It was granted in part and denied in part and the oral ruling was reduced to writing on September 14, 1966. The Court sustained the motion as to the formal, verbatim-recorded statements obtained on November 29 and 30, 1962, and December 7 and 12, 1962, of Vaughn Townsend, Donald Townsend and Vernon Townsend and the evidentiary fruits thereof. The government concluded that such material had been used in obtaining the indictment and voluntarily dismissed the indictment on March 11, 1966.

The government resubmitted the case to the Grand Jury and a new four count indictment charging the defendant with the same offenses was returned on March 18, 1966 in the captioned cause. Thereafter, the July 1, 1966 verified Motion For Return Of Property And To Suppress Evidence was filed. The motion is identical with the motion filed in Cause Number HP 65-Cr-115 except that the defendant also requests the return of the original and all copies, coded and decoded, of the question and answer statement of the defendant and further requested the suppression of any evidence occurring or originating after November 29, 1962.

In pre-trial proceedings conducted July 1, 1969, the parties agreed to and did submit the issues of the motion on the evidentiary record made in the submission of the issues of the Motion To Suppress in the previous case. The Court, being advised in the matter and having considered the evidence, the verified pleadings, the briefs and proposed findings of the parties, the last of which was recently filed, does not enter its rulings.

The following findings of fact one through twenty-six were agreed to by counsel when submitted in Cause Number IP 65-Cr-115 and because of the clarification of the law since such findings in that cause the twenty-seventh and twenty-eighth findings have been added.

FINDINGS OF FACTS

1. The civil examination of the defendant by the Internal Revenue Service began officially in April of 1960 under the direction of Internal Revenue Agent Francis E. Greenwell, then of Muncie, Indiana. The Muncie Office of the Internal Revenue Service, to which office Mr. Greenwell was assigned, had received information from Mr. Morris Cohen, an employee of the Department of Labor in March, 1960, that the Department of Labor had just completed an examination of the Townsend Tree Service Company, R. R. 1, P. O. Box 961, Muncie, Indiana. Mr. Cohen informed Internal Revenue Agent John S. Kiefer, an associate of Francis E. Greenwell in the Muncie Office of the Internal Revenue Service, that the Townsend Company was engaged in certain acts and actions in violation of the withholding provisions of the Internal Revenue Code of the United States of America. Revenue Agent Kiefer conveyed this information to Revenue Agent Greenwell.

2. Mr. Greenwell talked to the defendant on April 18, 1960, saying nothing about the information provided to the Internal Revenue Service by Mr. Cohen, or the alleged violations of the Internal Revenue Code referred to by Mr. Cohen, but told the defendant that he was assigned the partnership return of the Townsend Tree Service Company for examination and asked to examine books and records. Mr. Greenwell was the only Internal Revenue Agent conducting the investigation from April, 1960,

through July, 1961. He kept no records of what was said or what he did with regard to anything pertaining to the defendant's constitutional rights. At no time did he tell the defendant that the defendant's personal tax returns were under investigation. He showed the defendant his credentials, but did not explain or define the duties of his employment with the Internal Revenue Service. He made no attempt to advise the defendant that the defendant was entitled to first consult a lawyer. But there has been no evidence or indication that the information supplied by Mr. Cohen ever became the subject of the investigation herein and there has been no indication that the defendant's personal return as such has been criminally investigated or disputed except insofar as the figures thereon are or were derived from or arithmetically related to the figures appearing on the Townsend Tree Service Partnership return.

3. Mr. Greenwell examined, during his civil examination, a large portion of the records of the Townsend Tree Service Partnership, and he observed that checks were missing from these records, although he did not inform the defendant what he had found or that he had allegedly discovered fraud. Mr. Greenwell admitted that if he had an affirmative duty at this time to tell the defendant that he was under investigation personally, he did not fulfill that duty.

4. Mr. Greenwell made copies of records of income and expenses of the Townsend Tree Service Company Partnership and turned these records over to the Intelligence Division of the Internal Revenue Service on or about August, 1961.

5. Mr. Greenwell never told the defendant the difference in the duties of employment of an Internal Revenue Serv-

ice Intelligence Agent and of an Internal Revenue Service Agent.

6. Special Agent Wayne Otto of the Intelligence Division of the Internal Revenue Service officially entered the investigation of the defendant on or about August, 1961, when he interviewed Internal Revenue Agent Greenwell and learned everything about the case that Internal Revenue Agent Greenwell then knew. He continued the investigation of the defendant thereafter, but the first time that he ever met or talked with the defendant was on November 29, 1961, when he and Mr. Greenwell conferred with the defendant in the defendant's office near Muncie, Indiana.

7. At this first official contact of the defendant by an agent of the Intelligence Division of the Internal Revenue Service, Agent Otto was introduced to the defendant by Agent Greenwell. At that introduction, Mr. Otto did not tell the defendant the duties of an Intelligence Agent of the Internal Revenue Service, or that there was an investigation for tax fraud of the defendant in progress, or that the defendant faced a potential income tax evasion criminal charge. He did show the defendant his printed credentials. Mr. Otto did not advise the defendant of any of his constitutional rights and specifically did not advise him that he could get an attorney or representative, or that he had a right to have one, or that the defendant did not have to talk with the agents, or did not have to say anything that might incriminate him, or that the defendant had a right to remain silent, nor did Agent Greenwell give the defendant any special advice.

8. Agent Otto returned to his office in Indianapolis and made a memo of his interview of November 29, 1961 with the defendant. In that interview, the defendant told Mr.

Otto and Mr. Greenwell what his duties consisted of concerning the keeping of the records of the partnership, from which partnership records and returns the individual tax returns of the defendant and his two brothers were prepared; the defendant told Mr. Otto how his individual tax returns were prepared and who prepared them, and that he, the defendant, supplied information to Mr. Schneiter, the accountant and representative of the partnership; also that he had made certain mistakes and errors regarding sales of materials of and for the partnership for certain years and discussed how these sales were reported on the partnership records, and that he, the defendant, made these records and entries. Also, the defendant advised Mr. Otto and Mr. Greenwell of various matters relating to his personal income and expense and the records relating thereto, including the absence of personal cancelled checks and bank statements for various years, among many other things. All of this information was given to Agents Otto and Greenwell by the defendant in an interview wherein the defendant was never advised of his right against self-incrimination, or of his right to seek the advice of counsel.

9. At the interview of November 29, 1961, Agent Otto also asked the defendant for the opportunity to peruse and investigate the books and records which were being kept and maintained in the aforesaid office of the Townsend Tree Service Company. These records were turned over to Agent Otto and he examined and inspected all of the books and records and made transcriptions of the cash receipts and sales records for the years 1956 through and including 1960, but did not advise the defendant that he did not have to produce any of such records. With defendant's permission, Agent Otto took certain sales books from the Townsend Tree Service Office and made a reproduction thereof.

10. On December 8, 1961, Agent Otto again interviewed the defendant but did not advise the defendant of any of his constitutional rights, nor did he define for the defendant what type of an agent he was or what his responsibilities and duties were.

11. The defendant was not advised of the difference between the Intelligence Division of the Internal Revenue Service and the Audit Division of the Internal Revenue Service, or their separate distinct functions until February 15, 1962 when such advice was given by Agent B. L. Brutscher.

12. As of December 22, 1961, Special Agent Otto was removed from the case. The Internal Revenue Service then assigned the criminal investigation of the defendant to Intelligence Agent B. L. Brutscher.

13. Special Agents Otto and Brutscher conferred concerning the investigation that was pending against the defendant and Mr. Otto conveyed to Mr. Brutscher information that he had received from his investigation of the defendant and from examination of the defendant's records and from Agent Greenwell's examination of the records of the defendant and of the Townsend Tree Service Company, including Agent Otto's memorandum of his November 29, 1961 conversation with the defendant. Agent Brutscher never asked Agent Otto if Mr. Otto had advised the defendant of any of his constitutional rights. During the conference between Agents Otto and Brutscher, other cases were discussed in addition to the investigation of the defendant, Vaughn Townsend.

14. Agent Greenwell, on or about August, 1961, reported that preliminary estimates of his civil tax investigation disclosed civil tax liabilities of a large portion of the taxes owed and not paid by the Townsend Tree Service Partner-

ship and its partners, and that such omission appeared to be fraudulent. Agent Greenwell reported this to the Intelligence Division of the Internal Revenue Service and then had no further contact with the defendant until November 29, 1961. All of Agent Greenwell's investigation was turned over to Agent Otto and there was nothing that Agent Greenwell had learned that Agent Otto did not subsequently learn. In turn, Agent Otto turned over all information that he had acquired from Mr. Greenwell and that he personally had acquired in the investigation to Agent Brutscher, and there was no information that Agent Otto had acquired that was not transmitted to Agent Brutscher. Agent Brutscher did not meet the defendant until February 15, 1962, but prior thereto he talked with Agent Greenwell in detail about the case on January 15, 1962. Agents Brutscher and Greenwell attempted to reconcile certain Townsend income records in January, 1962, and used in this reconcilement attempt the work-papers that Agent Otto had made from the records of the Townsend Tree Service Company, as well as the books and records of the Townsend Tree Service Partnership themselves.

15. Agent Brutscher at no time attempted to contact the defendant to obtain permission for an examination of these books and records or for the reconcilement attempt that he had made, nor did he tell the defendant that he had been assigned the case after Agent Otto had been removed therefrom.

16. Agent Brutscher identified himself to the defendant and the defendant's brothers on February 15, 1962 as a Special Agent of the Intelligence Division of the Internal Revenue Service, and explained to the defendant what Agent Greenwell's function was and what his function was and how the two differed. Mr. Brutscher also specifically

advised the defendant that he had a constitutional right not to disclose anything to him, nor was he required to permit Mr. Brutscher to look at his records. Mr. Brutscher, however, never advised the defendant as to his right to seek and obtain the guidance of legal counsel.

17. Agent Brutscher then proceeded to conduct an investigation of the Townsend Tree Service Company and the defendant and his two brothers, Donald and Vernon Townsend. This was a criminal investigation into the tax affairs of the named persons and it lasted until on or about June 3, 1963. At the outset of his investigation, Agent Brutscher obtained the permission of the defendant and his brothers, Donald and Vernon Townsend, to inspect the books and records which were kept in the office of the Townsend Tree Service Company. At the time of the investigation, the Townsend Tree Service Company was both a corporation and a partnership, but it appears that almost all of the books and records inspected were the property of the partnership, not the corporation. The Townsend Tree Service Partnership was owned by the defendant and his two previously named brothers. Each brother had a total, undivided interest in the books and records of the partnership. Each brother individually gave his consent to the inspection of these books and records by Agent Brutscher and in no instance was this consent ever retracted.

18. During the course of his investigation, Agent Brutscher was assisted by Agent Greenwell. At the outset of the criminal investigation, Agent Greenwell's only contributions from the product of his prior civil investigation were his preliminary estimates as to civil tax liability for the partnership, the defendant and his brothers and their respective wives for the two years immediately preceeding

the year which is the subject of the indictment herein and two workpapers which he had obtained from Fred Schnieter who was the accountant who prepared the tax returns for the partnership, the defendant, the defendant's brothers and their wives.

19. During the course of his investigation, Agent Brutscher presented the work-papers which had been obtained from Fred Schnieter to the defendant and the defendant made no protest over the fact that Agent Brutscher had possession of those papers. Also during the course of his investigation, Agent Brutscher had, with the consent of the defendant, access to the 1959 partnership sales record which had first been inspected by Wayne Otto and copied during the course of his investigation and Mr. Brutscher actually took the said sales record from the files and used it from time to time.

20. During the course of his investigation, Agent Brutscher had conversations with the defendant and his brothers on numerous occasions, but he took only one formal question and answer statement from the defendant. This was a question and answer statement taken in the presence of a stenographer on November 29 and November 30, 1962. At the beginning of the question and answer session, Agent Brutscher advised the defendant that he was entitled, under the Constitution of the United States, to refuse to answer any questions which might tend to incriminate him. Toward the end of the first day, the defendant was specifically advised that the matters which he was admitting to would render him, if convicted, criminally liable under the Internal Revenue Laws of the United States and he acknowledged that he realized this.

21. The defendant was asked to submit to his formal question and answer interview by Agent Brutscher several

days before the interview took place and at that time he was told that the interview would be typed into a transcript and that he would be given the opportunity to review his answers and sign the transcript. The defendant thereafter acted under the belief that his question and answer statement required his signature before it could ever be used against him. Agent Brutscher did not purposely implant this thought in the defendant's mind.

22. With respect to all records involved in this case which belonged to businesses other than the Townsend Tree Service Partnership and the Townsend Tree Service Corporation, and which were inspected or copied or obtained by Internal Revenue Service Agents and Special Agents, no deception, stealth or trickery was involved except where such records were obtained as the fruits of the formal, verbatim-recorded question and answer interviews of Donald Townsend, Vernon Townsend and Vaughn Townsend on November 29 and 30, 1962, and on December 7 and 12, 1962.

23. With respect to all business and other records referred to in the defendant's Motion To Suppress Evidence which was filed in this Court on November 8, 1965, as described in the evidence at the hearing, access to these records was obtained by Internal Revenue Service Agents without resort to deception, stealth or trickery except where such records were obtained as the fruits of the formal, verbatim-recorded question and answer interviews of Donald Townsend, Vernon Townsend and Vaughn Townsent on November 29 and 30, 1962, and on December 7 and 12, 1962; however, the defendant's work-papers were obtained from his accountant, Mr. Schnieter, by either Agent Greenwell or Agent Otto prior to April, 1962, and without the express permission of the defendant. But, subsequent

to the termination of Agent Otto's phase of the investigation, the defendant referred the agents to Mr. Schnieter as being his accountant and as being the person who could best explain the tax affairs of the Townsend Tree Service Partnership, and the defendant at no time instructed Mr. Schnieter not to release any work-papers.

24. With respect to all recorded and unrecorded statements made by the defendant, Donald Townsend, Vernon Townsend, Esther Terry, Fred Schnieter and others during investigation of the Internal Revenue Service into the matters involved in this cause, the said statements were obtained by the Internal Revenue Service without resort to stealth, deception or trickery, with the exception that the formal question and answer interviews of Donald Townsend, Vernon Townsend and Vaughn Townsend on November 29 and 30, 1962, and on December 7 and 12, 1962, and any subsequent statements by any individuals which were the fruits of the said formal, verbatim-recorded question and answer interviews.

25. Inadvertent deception was employed by Internal Revenue Service Special Agent Brutscher in obtaining the recorded question and answer statements of Donald Townsend, Vernon Townsend and Vaughn Townsend on November 29 and 30, 1962, and on December 7 and 12, 1962, and with respect to all of the fruits, if any, thereof.

26. The Court expressly makes no finding of fact on the question of whether any evidence was obtained against the defendant as a result of the illegal evidence referred to in the preceding findings, to-wit, the question and answer statement.

27. The defendant at all times prior to February 15, 1962 did not know that he was being investigated by the Internal Revenue Service for a criminal violation. He felt

he was obligated to cooperate with such agents during such time prior to February 15, 1962 and that it was too late not to be cooperative thereafter. The defendant was unaware of his constitutional rights prior to such date and of the duties of such agents to advise him of his rights.

28. The agents had no search warrant for the examination of defendant's and the partnership's records and did not have the knowledgeable waivers of such requirement by the defendant and any of the partners.

Based on the foregoing findings of facts the following conclusions of law have been settled upon. Because of the development of the law[1] these conclusions differ in part from the conclusions of law in the entry in Cause Number IP 65-Cr-115.

This Court by reason of a pending appeal from a ruling in the case of *United States of America v. Habig*, 413 F.2d 1108 (7 CA July 28, 1969) was aware of the pending cases on appeal of *United States of America v. Lackey*, 413 F.2d 655 (7 CA July 16, 1969) and *United States of America v. Dickerson*, 413 F.2d 1111 (7 CA July 28, 1969). The Court advised counsel for plaintiff and defendant prior to such decisions that prospective rulings upon issues thereon would probably be dispositive of the issue of suppression of evidence in the instant case. Counsel were requested to be alert for these decisions when published. This Court intended to await the decisions' publications to avoid a probable useless and inconclusive ruling. The instant case was referred to indirectly in the decision of

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[1] *Miranda* v. *Arizona*, (June 1966), 384 U.S. 436; *Mathis* v. *United States*, (May 1968), 391 U.S. 1; *Orozco* v. *Texas*, (March 1969), 394 U.S. 324; *United States* v. *Lackey*, (7 CA July 1969), 413 F.2d 655; *United States* v. *Dickerson*, (7 CA July 1969), 413 F.2d 1111.

United States of America v. Dickerson, 413 F.2d 1111 at page 1114 footnote 6. The government referenced it in the companion case of *United States of America v. Habig* (supra) by citing this Court's ruling on the Motion To Suppress in dismissing Cause Number IP 65-Cr-115 but made no reference to the pending Motion To Suppress in Cause Number IP 66-Cr-61. This Court fully intended to suppress the evidence if the Court of Appeals for the Seventh Circuit suppressed the evidence in the referenced cases by extending the rule of *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694; *Orozco v. Texas*, 394 U.S. 324, 89 S.Ct. 1095, 22 L.Ed.2d 311; and of *Mathis v. United States of America*, 391 U.S. 1, 83 S.Ct. 1503, 20 L.Ed.2d 381 to this class of cases. It is to be noted that the Court in *United States of America v. Dickerson*, 413 F.2d 1111 at page 1117 extended to the *Habig* case (supra) the benefits of its ruling:

> "In conformity with the more recent practice * * * we have determined to apply our holding to interrogations taking place after the date of this decision. * * *. The defendant in the companion Habig case, which was argued together with the instant case, will also be entitled to the benefit of today's holding. *However, it is not our intent to disturb previously ordered suppressions of evidence anticipating our holding today.* * * *."

It is obvious that the Court was not aware of the pendency of the identical issues in the instant case, Cause Number IP 66-Cr-61. The government is possessed of the inventory of many cases. By the process of selected appeals, sometimes it achieves implied rulings affecting other delayed cases pending in the trial Court. Thus, by the per chance or intentional earlier disposition of the *Habig* case on the trial level and the delay of the instant *Townsend* case, the

Townsend case was not a companion case on appeal. The trial Court is frequently requested by the government to withhold rulings when it has marshalled its inventory of cases so as to test an issue in another favored case. Here the government tied the *Townsend* ruling in the dismissed action to the *Habig* case and caused it to be consolidated on appeal with the *Dickerson* case with full knowledge that there was a pending Motion To Suppress in the new action against Townsend which was ready for ruling but awaiting final briefing. But for the delay, the *Townsend* case might well have expressly been a companion case of *Dickerson.*

CONCLUSIONS OF LAW

A) The plaintiff failed to obtain a search warrant to examine the books and records of defendant and the partnership and the burden of proof is upon the plaintiff to show the lawful acquisition of the evidence in issue.

B) The defendant and his partners did not waive the requirement of a lawful search warrant.

C) The plaintiff has failed to prove that the defendant and his partners voluntarily waived their rights to require plaintiff to have a search warrant.

D) The plaintiff's agents failed to advise the defendant of his constitutional rights before obtaining information by orally interrogating him and obtaining the records of defendant and the partnership in issue.

E) The formal, verbatim-recorded statements of Vaughn Townsend, Donald Townsend and Vernon Townsend obtained on November 29 and 30, 1962, and on December 7 and 12, 1962, and the fruits thereof constitute illegal evidence which may not be used in this or in any other crim-

inal proceeding against the defendant as it was obtained from him based upon a misunderstanding, or upon a promise, or inducement which was not maintained by plaintiff. Under such circumstance, it would violate defendant's constitutional rights to permit such evidence to be used as evidence in the trial of the defendant.

F) The evidence obtained during the period from July, 1961, to February 15, 1962, consisting of oral statements of the defendant and his partners, their agents and employees to the agents of plaintiff and the fruits therefrom during such period of time and thereafter and the books and records of the defendant and of the partnership and corporation and the fruits therefrom during such period of time and thereafter constitute illegal evidence which may not be used in this or in any other criminal proceeding against the defendant as it was obtained in violation of the constitutional rights of the defendant, without his consent and without a search warrant which rights were not waived by the defendant.

G) The evidence obtained during the period from February 15, 1962 to the end of the criminal investigation, consisting of oral statements of the defendant and his partners, their agents and employees to the agents of plaintiff and the fruits therefrom during such time and thereafter and the books and records of the defendant and of the partnership and corporation and the fruits therefrom during such period of time and thereafter constitute illegal evidence which may not be used in this or in any other criminal proceeding against the defendant as it was obtained in violation of the constitutional rights of the defendant, without his consent and without a search warrant which rights were not waived by the defendant.

JUDGMENT

IT IS THEREFORE ADJUDGED that the following evidence obtained by the United States of America for the prosecution of a crime allegedly committed by Vaughn L. Townsend be and is suppressed:

1. Verbatim transcript of a question and answer interview of Vaughn L. Townsend on November 29 and 30, 1962, and said transcript consisting of one thousand eight hundred sixty-eight (1868) consecutively numbered questions and answers on one hundred eighty-nine (189) consecutively numbered pages.

2. Verbatim transcript of a question and answer interview of Vernon Townsend on December 7, 1962 the said transcript consisting of three hundred seventy-four (374) consecutively numbered questions and answers on forty-six (46) consecutively numbered pages. The first four (4) consecutively numbered pages of the transcript and the first thirty-nine (39) consecutively numbered questions and answers thereon have been extracted from the said transcript and not shown to defense counsel all of which is in accordance with the prior agreement of the parties.

3. Verbatim transcript of a question and answer interview of Donald Townsend on December 12, 1962 the said transcript consisting of three hundred ninety-nine (399) consecutively numbered questions and answers on forty-eight (48) consecutively numbered pages.

4. All oral statements of the defendant to agents of the plaintiff during the period July, 1961, to February 15, 1962, and the evidentiary fruits of such statements obtained during such period and the evidentiary fruits obtained thereafter from such statements.

5. All oral statements of the partners and the officers, agents and employees of the partnership and corporation during the period July, 1961, to February 15, 1962, and the evidentiary fruits of such statements obtained during such period and the evidentiary fruits obtained thereafter from such statements.

6. All records of defendant and of the partnership and corporation obtained during the period July, 1961, to February 15, 1962, and the evidentiary fruits of such records obtained during such period and the evidentiary fruits obtained thereafter by reason of such records.

7. All oral statements of the defendant to agents of the plaintiff during the period February 15, 1962 to the end of the criminal investigation and the evidentiary fruits of such statements obtained during such period and the evidentiary fruits obtained thereafter from such statements.

8. All oral statements of the partners and the officers, agents and employees of the partnership and corporation obtained during the period February 15, 1962 to the end of the criminal investigation and the evidentiary fruits of such statement obtained during such period and the evidentiary fruits obtained thereafter from such statements.

9. All records of defendant and of the partnership and corporation obtained during the period February 15, 1962 to the end of the criminal investigation and the evidentiary fruits of such records obtained during such period and the evidentiary fruits obtained thereafter by reason of such records.

IT IS FURTHER ORDERED that such evidence shall not be used in the captioned case or in any other criminal proceeding against Vaughn L. Townsend.

IT IS ALSO FURTHER ORDERED that the portion of the defendant's motion requesting the return of such records be and is denied as the plaintiff civilly has a right to such records and the use thereof in the enforcement of any civil claim for unpaid taxes, interest and penalties.

Dated this 7thday of November, 1969.

CALE J. HOLDER

CALE J. HOLDER, Judge,
United States District
Court Southern District
of Indiana

IN THE

United States Court Of Appeals

FOR THE SEVENTH CIRCUIT

SEPTEMBER TERM, 1970 — APRIL SESSION, 1970

No. 18000
UNITED STATE OF AMERICA,
Plaintiff-Appellant,
v.
JAMES F. GALLAGHER,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of Indiana, Indianapolis Division

JULY 9, 1970

Before KILEY and CUMMINGS, *Circuit Judges*, and DOYLE, *District Judge.*[1]

CUMMINGS, *Circuit Judge.* Under 18 U.S.C. § 3731,[2] the Government has appealed from an order suppressing certain statements and documents obtained by the Internal

[1] Judge Doyle, Chief Judge of the United States District Court for the Western District of Wisconsin, is sitting by designation.

[2] 18 U.S.C. § 3731 provides in part:

"An appeal may be taken by and on behalf of the United States from the district courts to a court of appeals in all criminal cases, in the following instances:

* * *

"From an order, granting a motion for return of seized property or a motion to suppress evidence, made before the trial of a person charged with a violation of any law of the United States, if the United States attorney certifies to the judge who granted such motion that the appeal is not taken for purposes of delay and that the evidence is a substantial proof of the charge pending against the defendant."

Revenue Service from defendant before he was indicted for filing fraudulent income tax returns for 1961, 1962 and 1963 in violation of 26 U.S.C. § 7201.[3]

Defendant's tax returns were first examined by Revenue Agent John C. Ramos, who subsequently referred them to the Intelligence Division of the Internal Revenue Service. The jurisdiction of the Intelligence Division is limited primarily to criminal investigations, and this case was assigned to Special Agent Richard Wuerth of that Division on August 5, 1965.

From September 22, 1965, until January 10, 1966, the special agent, ordinarily accompanied by a revenue agent, conducted three interviews at defendant's office. At the first visit, Wuerth asked defendant, a lawyer, if he was familiar with the Intelligence Division and its responsibilities in income tax investigations. Defendant said he was. At the first two interviews, defendant furnished Wuerth with various documents and records. On February 18, 1966, at the start of the fourth interview, which took place in the Federal Building at Terre Haute, Indiana, Wuerth first gave defendant the warnings prescribed in *Miranda v. Arizona*, 384 U.S. 436. During all the interviews, defendant was free to come and go as he pleased.

Defendant filed a motion to suppress the statements, books, and records obtained from him by the government

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[3] 26 U.S.C. § 7201 sets forth that

"Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution."

agents on the ground that such evidence was obtained from him "involuntarily, in violation of his constitutional rights," and while he was mentally incompetent. The district court took evidence but, upon the request of the Government, delayed ruling upon the merits of the motion until after this Court announced its opinions in *United States v. Lackey*, 413 F. 2d 655 (7th Cir. 1969); *United States v. Dickerson*, 413 F. 2d 1111 (7th Cir. 1969), and *United States v. Habig*, 413 F. 2d 1108 (7th Cir. 1969). Thereafter, the district court granted defendant's motion and suppressed any statements and documents obtained by the special agent between the first interview on September 22, 1965, and the fourth interview on February 18, 1966.[4] The court did not pass upon the second basis for defendant's motion that the admissions and documents were not furnished voluntarily to the Government because defendant was mentally incompetent at the time.

In *United States v. Dickerson*, 413 F. 2d 1111 (7th Cir. 1969), we expanded the circumstances under which Internal Revenue Service agents are required to warn a suspect of his constitutional rights. There we concluded that "*Miranda* warnings must be given to the taxpayer by either the revenue agent or the special agent at the inception of the first contact with the taxpayer after the case has been transferred to the Intelligence Division." 413 F. 2d at pp. 1116-1117. At the same time, we recognized the novelty of this departure from prior definitions of "cus-

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[4] The district court suppressed all documents, apparently without inquiring into their character (cf. *Shapiro* v. *United States*, 335 U.S. 1) or whether they might be suppressed as the fruit of invalidly obtained statements. In light of our conclusions on the lack of necessity of *Miranda* warnings in this case, we need not discuss the validity of the court's suppression order as it applied to the tangible evidence produced by defendant at the interrogations.

fodial interrogation" and limited the application of *Dickerson* to interrogations taking place after the date of that decision. 413 F. 2d at p. 1117. Finally, in order to avoid confusion in the administration of justice, and to prevent dampening initiative already taken independently by district courts, we expressly disavowed any intention of disturbing previously ordered suppressions of evidence.

Defendant is not entitled to the application of the *Dickerson* holding. The interrogations took place three years before our decision. Despite the fact that the ruling below was delayed at the request of the Government, the instant suppression order was entered subsequent to *Dickerson*. The exception to previously ordered suppressions therefore does not apply, as Judge Decker recognized in *United States v. Lehman*, No. 69 CR 25 (N.D. Ill. 1969).

The interrogations in this case must, therefore, be judged in light of the prior law of this Circuit, requiring that the accused be in custody or "deprived of his freedom in any significant way" before receiving the prescribed warnings. *Miranda v. Arizona*, 384 U.S. 436, 444; *United States v. Lackey*, 413 F.2d 655, 657 (7th Cir. 1969); *United States v. Campione*, 416 F.2d 486, 489 (7th Cir. 1969). Defendant can make no colorable claim to having been so deprived of his freedom as to entitle him to constitutional warnings. The evidence shows that he acknowledged his awareness of the function of the Intelligence Division. The critical interviews occurred in defendant's own law office, and he was free to come and go. There is no indication of any intimidation or oppressive circumstances.

Defendant additionally claimed that his statements were not voluntarily given because of his incompetency. The district judge expressly reserved disposition of this contention, and we shall not preempt his factual inquiries and

judgment. Nor do we wish to foreclose defendant from elaborating on the evidence supporting that claim should he wish to pursue the matter on remand.

Reversed and remanded.[5]

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit.

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[5] Since the first issue in *United States* v. *Gallagher* is the same as the sole issue raised on appeal in *United States* v. *Townsend* (No. IP 66-Cr-61C, S.D. Ind. 1969), now pending before this Court on appeal (No. 18159), we shall summarily dispose of that appeal pursuant to Rule 2 of the Federal Rules of Appellate Procedure. *National Labor Relations Board* v. *Playskool, Inc.*, . . . F.2d . . . (7th Cir. 1970). In *Townsend* the district court erroneously applied the standard prescribed in *United States* v. *Dickerson*, 413 F.2d 1111 (7th Cir. 1969), to dispose of a motion to suppress evidence then pending before the court. The order of the district court in that case is therefore reversed.

PROOF OF SERVICE

I, Don A. Tabbert, the attorney for Vaughn L. Townsend, petitioner herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the —— day of September, 1970, I served three (3) copies of the foregoing Petition for Writ of Certiorari to the Court of Appeals for the Seventh Circuit on the sole party required to be served, namely, the United States of America, Respondent, by mailing such copies in a duly addressed envelope, with Air Mail postage prepaid, to The Solicitor General, Department of Justice, Washington, D.C. 20530.

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